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Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

—v.—

ARTIST M., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE LEGAL AID SOCIETY OF NEW YORK, MENTAL HEALTH LAW PROJECT, AND YOUTH LAW CENTER, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici either represent or are comprised of individuals who represent abused and neglected children embroiled in child welfare systems throughout the 50 states. They include membership organizations representing literally thousands of juvenile court practitioners, judges and related professionals (National Association of Counsel for Children and National Legal Aid and Defender Association); child advocacy organizations (American Civil Liberties Union, through its Children's Rights Project; ACLU of Illinois; Mental Health Law Project; and Youth Law Center) litigating to enforce the reasonable efforts and other provisions of the Adoption Assistance and Child Welfare Act of 1980 ("The AACWA"); and the largest provider of direct legal services to juveniles in the United States (The Legal Aid Society of New York).

STATEMENT OF THE CASE

I. The AFDC-Foster Care Program And The Adoption Assistance And Child Welfare Act Of 1980

In 1961, Congress established the Aid to Families with Dependent Children-Foster Care program ("AFDC-FC") as part of the federal AFDC program for needy families with dependent children.[2] Congress structured

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Act of May 8, 1961, Pub.L. No. 87-31, §2, 75 Stat. 76. *See* 42 U.S.C. §608 (1976)(AFDC-Foster Care program), §§601-606 (1988 & Supp. I 1990)(basic AFDC program). *See also* Pub.L. No. 90-248, §205(a), 81 Stat. 892 (1968)(making AFDC-FC program mandatory for all states participating in basic AFDC program). All citations to the United States Code are to the 1988 & Supp. I 1990 edition, unless otherwise indicated. All citations to the Ill. Rev. Stat. are to the 1989 edition (continued...)

AFDC-FC in the same manner as the basic AFDC program. Benefits were distributed to foster children by the participating states, each of which was required to have in effect (as part of the state AFDC "plan" itself) a foster care program that met certain specified statutory requirements. 42 U.S.C. §§602(a)(20), 608 (1976). In 1979, this Court unanimously recognized the right of foster care children to seek federal court relief to enforce AFDC-FC requirements. *Miller v. Youakim*, 440 U.S. 129, 137-38 (1979).

As the American Association for Protecting Children and other organizations detail in their *amicus* brief ("AAPC Brief"), the AFDC-FC program was a failure. Once removed from their parents, most children were doomed never to be returned home or to attain stable or permanent family relationships.

In 1980, Congress acted to correct these problems, replacing the AFDC-FC program with a new foster care program set forth in Title IV-E of the Social Security Act. Like its predecessor, IV-E utilizes a "state plan" structure. 42 U.S.C. §671. However, Congress explicitly strengthened federal requirements to prevent placement of children in foster care and to reunite children already placed in foster care with their parents:

> In order for a State to be eligible for payments under this part [IV-E], it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions

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[2] (...continued)
unless otherwise indicated. Citations to Pet.Br. are to the Petitioner's Brief. Citations to Op.Cert.App. are to the Appendix to the Brief in Opposition to *Certiorari*. Citations to SG Br. are to the Brief for the United States as *amicus curiae*. Citations to Council Br. are the Brief of the Council of State Governments, *et al.*, as *amici curiae*. Citations to the States' Br. are to the Brief of the States of Louisiana, Alabama, *et al.*, as *amicus curiae*.

> of the State . . . [and which] provides that, in each case, reasonable efforts will be made, (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his own home.

42 U.S.C. §§671(a)(3), (15).

II. The Illinois Child Welfare System

Petitioner Suter is the Director of the Illinois Department of Children and Family Services ("DCFS").[3] In FY 1990, DCFS received approximately $70 million in federal funds to administer its IV-E program. Illinois Department of Children and Family Services, *Financial and Compliance Audit* (1990) at 112.

When a child in Illinois has been judicially determined to be "abused, neglected, or dependent" in his or her parental home, Ill. Rev. Stat. ch. 37 §§802-3, 802-4 (defining these terms), DCFS may be awarded "temporary custody" of the child or the juvenile court may send the child home under a "protective order" setting forth conditions that the parents must observe to keep the child. Op.Cert.App. 11 (Finding No. 4); Ill. Rev. Stat. ch. 37 §§802-25, 802-26. Under a system of DCFS' design, a caseworker is supposed to be assigned to each such child to identify and provide appropriate child welfare services -- including services designed to preserve or reunite the family. Op.Cert.App. 11-13 (Findings Nos. 4-8). Without a caseworker, a child and his family cannot

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[3] Petitioner Gary Morgan is the individual at DCFS appointed by the Illinois juvenile courts to act as guardian for the children in DCFS' care. Collectively, Ms. Suter and Mr. Morgan are referred to herein as "petitioners."

receive foster care prevention and family reunification services. *Id.* at 13 (Finding No. 9).

DCFS has regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to plaintiffs and their families, both in protective order and temporary custody cases. *Id.* at 15 (Finding No. 13). Because of DCFS' delay, neither foster care prevention services nor family reunification services -- or indeed any services at all -- were provided such children. *Id.* (Findings Nos. 9, 10).

III. This Case

On December 14, 1988, a plaintiff class of children in the "temporary custody" of the State of Illinois or under a "protective order" filed suit against petitioners, alleging that DCFS routinely failed to timely assign them caseworkers in violation of, *inter alia*, the reasonable efforts requirements of the AACWA, 42 U.S.C. §671(a)(15). Plaintiffs moved for a preliminary injunction restraining DCFS' failure to provide them with caseworkers.

At the hearing on plaintiffs' motion, DCFS admitted it did not timely assign caseworkers, but maintained that a "reorganization plan" would remedy the problem. Pet. App. 341; Op.Cert.App. 30 (Stipulation No. 7). The district court postponed ruling on the preliminary injunction motion in order to give DCFS' reorganization plan a chance.

On April 3, 1990, fifteen months after the preliminary injunction hearing, the district court concluded that DCFS' reorganization plan had been a failure and granted the children's motion for a preliminary injunction. (Pet.App. 51a - 58a). The district court rejected plaintiffs' request that caseworkers be assigned within 24 hours. Instead, relying on DCFS' statement that assignment of caseworkers within a three day period "would

not be overly burdensome," *id.* at 54a, it ordered defendants "to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three days of the time that plaintiffs' cases are first heard in Juvenile Court " or within three days of the time "that a previously assigned caseworker relinquishes responsibility for any portion of a case." *Id.* at 56a.

The United States Court of Appeals for the Seventh Circuit affirmed. (Pet.App. 1a, 30a). Petitioners filed a timely petition for *certiorari*, and this Court granted the petition on May 13, 1991.

SUMMARY OF ARGUMENT

The AACWA requires states accepting federal IV-E funds to have a "plan" "in effect" which provides that "in each case, reasonable efforts" will be made to prevent removal of children from their homes and to reunify children with their families once removed. 42 U.S.C. §§671(a)(3), (15). Petitioners do not dispute and the Solicitor General concedes that Congress intended these statutory provisions to create a binding obligation on the states for the benefit of children like these plaintiffs (Pet.Br. at 17, SG Br. at 16-17). The sole questions on which *certiorari* was granted in this case are (1) whether the statutory language on which Congress relied to effect that intent is so vague that enforcement of the right is beyond the competence of the federal judiciary, and (2) whether the reasonable efforts provision applies to children who remain in their own homes.

The principal argument advanced by petitioners and their *amici* is that no §1983 claim can be brought to enforce the AACWA's reasonable efforts clause because that clause is too vague to be construed by the federal judiciary. However, federal courts are well practiced in construing and enforcing reasonableness standards. This

Court has repeatedly so held for half a century, and a great deal of congressional draftsmanship assumes as much, as more than 140 provisions of the United States Code contain the same "reasonable efforts" language claimed to be vague and unenforceable here. Indeed, this Court has readily concluded that §1983 claims can be brought to enforce statutory "reasonableness" standards. *Wilder v. Virginia Hosp. Ass'n*, ___ U.S. ___, 110 S.Ct. 2510 (1990); *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987).

Petitioners and their *amici* recognize that the AACWA's reasonable efforts provision is sufficiently specific to be enforced by either the Secretary of HHS or the state judiciary, but assert with little explanation that it is not sufficiently specific to be enforced by the federal judiciary. There is no logical basis for that assertion. Moreover, the reasonable efforts provision at issue in this case is an especially compelling example of a judicially enforceable reasonableness standard, embedded, as it is, in an extensive and well-articulated set of professional standards.

On the second question presented, petitioners argue that the reasonable efforts requirement does not apply to children who remain in their homes because IV-E funds cannot be utilized to provide services to those children. However, the express language of the statute, and all other available evidence, indicate that this assertion is mistaken.

Petitioners and their *amici* also raise a number of arguments that go well beyond the questions on which *certiorari* was granted. Those arguments should not be considered but, if considered, lack merit.

Petitioners and their *amici* suggest that state court reasonable efforts determinations in individual cases and review of state plans by the Secretary of HHS constitute a comprehensive remedial scheme demonstrating con-

gressional intent to preclude a §1983 remedy. Pet.Br. at 40-42. However, this Court has repeatedly held that the existence of individual state court review does not foreclose §1983 actions, and the state court review at issue in this case is far too limited to meet the requirements for a comprehensive scheme manifesting congressional intent to foreclose reliance on §1983. *Wilder*, 110 S.Ct. at 2525. As to the Secretary's review, this Court has repeatedly held that administrative determinations regarding the propriety of continued funding under a spending clause statute do not "close[ ] the avenue of effective judicial review to those individuals most directly affected by" the statute in question. *Rosado v. Wyman*, 397 U.S. 397, 420 (1970).

Alternatively, petitioners hint in a footnote (Pet.Br. at 19 n.7) that the obligation imposed on states by the statute is merely an obligation to draft a paper "plan" and submit it for review by the Secretary, without imposing any obligation on the states to comply with the plan's statutory requirements.[4] However, the text of the AACWA expressly provides that a state must not only file but also comply with its IV-E plan, and congressional intent to create more than a paper right abounds throughout the AACWA's legislative history.

There being no basis under established law for reversing the decision below, petitioners and their *amici* resort to a series of policy arguments purporting to show that Congress "cannot have intended" to create an enforceable right in enacting the reasonable efforts clause. Whatever petitioners and their *amici* may think of the merits of that clause, this Court has always left policy judgments about the wisdom of creating such rights to Congress.

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[4] The Solicitor General offers similar speculation at the footnote level, (SG Br. at 15 n.6), while the Council of State Governments offers an extended argument on the point (Council Br. at 16-22).

ARGUMENT

I. THE REASONABLE EFFORTS CLAUSE OF THE AACWA IS ENFORCEABLE UNDER 42 U.S.C. SECTION 1983

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983 provides a cause of action against a state defendant for the deprivation of federal statutory rights. That holding applies unless (1) the statute does not create enforceable rights within the meaning of §1983, *see Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980); or (2) express congressional intent to foreclose §1983 relief can be clearly found. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). With respect to whether a right enforceable under §1983 exists:

> Such an inquiry turns on whether [(1)] "the provision in question was intended to benefit the putative plaintiff" [citations omitted]. If so, the provision creates an enforceable right unless [(2)] it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit . . . [citation omitted] . . . or unless [(3)] the interest the plaintiff asserts is "'too vague and amorphous'" such that "'it is beyond the competence of the judiciary to enforce.'"

Wilder, 110 S.Ct. at 2517; *see also Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865, 871-72 (1991); *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S.Ct. 444, 448 (1989); *Wright*, 479 U.S. at 431-32.

The first question presented in this case is narrowly drawn. The petition for *certiorari* and the bulk of petitioners' brief do not ask this Court to reexamine any of its decisions defining §1983 jurisprudence. Nor did the petition for *certiorari* include as a question presented

whether Congress intended to foreclose application of §1983 to the AACWA. Petitioners have not denied -- and the Solicitor General has admitted (SG Br. at 16) -- that the reasonable efforts clause was intended to benefit children like these plaintiffs. Petitioners have admitted that the question of whether the reasonable efforts clause creates a "binding obligation" on the states is "a point not at issue in this case," Pet.Br. at 17, and the Solicitor General affirmatively asserts that "the [reasonable efforts] requirement is mandatory, not precatory." SG Br. at 16. These concessions, forced by the text and legislative history of the Act,[5] leave as the first question properly before this Court whether the AACWA's reasonable efforts provision is too vague and amorphous to be judicially enforceable.

A. Enforcement Of The "Reasonable Efforts" Clause Is Not Beyond The Competence Of The Judiciary

This Court strives to construe statutory language to give effect to Congress' intent, not to thwart it. *See Watt v. Alaska*, 451 U.S. 259, 265-67, 270-73 (1981). In determining whether the "reasonable efforts" clause can be enforced by the judiciary, this Court must determine whether Congress was so inept in its draftmanship that it

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[5] The statute is unambiguous in its mandatory import. "In order for a State to be eligible" for IV-E payments, it "*shall* have a plan" consisting of "*requisite* features" which "provides that, *in each case*, reasonable efforts *will* be made." That plan "*shall* be in effect" throughout the state, and federal funds "shall" be cut off or reduced if there is a "substantial failure to comply the provisions of the plan." 42 U.S.C. §§671 (a)(3), (15); 671(b)(emphasis added). The legislative history confirms that the standard of child care spelled out in the AACWA -- including the reasonable efforts clause -- was specifically intended to directly benefit children like these plaintiffs. *See* the AAPC Brief for a complete discussion of the legislative history.

failed to create the right it intended to vest in these plaintiff children.

By arguing, as they do, that the reasonable efforts clause can be enforced by the state courts and by the Secretary of HHS, Pet.Br. at 40-42; SG Br. at 28-33, petitioners and their *amici* necessarily recognize that the reasonable efforts clause has sufficient content to be construed and enforced. The Solicitor General explicitly agrees that the reasonable efforts clause imposes identifiable obligations. SG Br. at 17 n.7. If the clause has sufficient meaning to be administered by state judges and the Secretary, that meaning does not evaporate when scrutinized by an Article III judge.[6]

1. The Judiciary Is Well Accustomed To Applying Reasonableness Standards

The heart of petitioners' position is their contention that the phrase "reasonable efforts" is too vague and amorphous to be capable of judicial enforcement. That phrase, however, is the very grist of judicial decision-making and congressional drafting. Federal courts routinely and necessarily apply the "reasonable efforts" formulation in thousands of statutory (and other) contexts every day.

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[6] Petitioners and their *amici* argue that the states and the Secretary differ from federal judges because they have greater expertise than do the federal courts in assessing the meaning of the reasonable efforts obligation. But, while expertise may help these tribunals deal with the complexity of the reasonable efforts clause, expertise cannot make meaningless language meaningful. This Court has never held that enforcement of a statutory provision is beyond the competency of the judiciary simply because it raises issues that call for particular expertise. Indeed, trial courts have long been well armed to deal with issues calling for specialized knowledge, and the Federal Rules of Civil Procedure and Evidence make specific provision for dealing with such questions. *E.g.*, Fed.R.Civ.P. 53 (special masters); Fed.R.Evid. 702-03 (expert testimony); Fed.R.Evid. 706 (court appointed expert).

Over fifty years ago, this Court rejected the very vagueness argument that petitioners raise here. In *Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U.S. 515, 545, 550 (1937), this Court was asked to find that a statutory provision requiring the exercise of "every reasonable effort" toward compliance with legislative objectives was so vague as to be unenforceable. Writing for the Court, Justice Stone rejected the argument virtually out of hand:

> There is no want of capacity in the court to direct complete performance of the entire obligation . . . Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable are everyday subjects of inquiry by courts in framing and enforcing their decrees.

Id. at 545, 550; *see also Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578-79 (1971) (*quoting Virginian Railway*). Nor does *Virginian Railway* stand alone in its recognition that reasonableness standards are judicially enforceable, for this Court has repeatedly acknowledged, imposed, enforced, and construed "reasonable efforts" obligations in a vast array of other contexts ranging from environmental protection to school desegregation to utilities regulation and beyond.[7]

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[7] **Environmental Regulation:** Federal regulations require "every reasonable effort to maintain radiation exposures . . . as low as is reasonably achievable," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 243 n.6 (1984). **Employment Discrimination:** Title VII requires that employers "make reasonable efforts to accommodate" the religious needs of their employees, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977). **Labor Relations:** Carriers are required by the Railway Labor Act to make "reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies," *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express* (continued...)

Indeed, to conclude that enforcement of the "reasonable efforts" phrase is beyond the competence of the federal judiciary would create an "engine of destruction," *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), that would wreak havoc in administering not only this Court's precedents, but the United States Code itself. The justiciability of that phrase is a *de facto* cornerstone of much statutory drafting. The phrase "reasonable efforts" appears in more than 140 separate provisions of the United States Code. Like the decisions of this Court cited above, these code provisions cover an immense conceptual expanse, including such issues as the standards governing the dissemination of records, 5 U.S.C. §§552a(e)(6) and (8), 38 U.S.C. §4132(f)(2); the funding of migrant health centers, 42 U.S.C. §245b(f)(7); the duties of various sorts of fiduciaries, 29 U.S.C. §1105; the administration of SBA loans, 15 U.S.C. §636(j)(10)(I)(i); and

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[7] (...continued)
& Station Employees, AFL-CIO, v. Florida East Coast Railway Co., 384 U.S. 238 (1966). **Desegregation**: School boards have "an obligation to exercise every reasonable effort to remedy [desegregation] violation[s]," *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 n.8 (1971). **Free Commerce**: "A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders," *Maine v. Taylor*, 477 U.S. 131, 147 (1986). **Reproductive Rights**: In enacting abortion legislation, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434 (1983). **Utilities Regulation**: A utility "may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury," *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18 (1978). **Procedural Due Process**: Federal Rule of Civil Procedure 23(c)(2) "requires that individual notice be sent to all class members who can be identified with reasonable effort," *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349 (1978); *Eisen v. Carlisle*, 417 U.S. 156, 177 (1974). **Federal Subpoena Power**: A respondent is under a duty to make "all reasonable efforts" to comply with a valid subpoena, *United States v. Ryan*, 402 U.S. 530, 534 (1971).

the administration of government funded scholarships, 20 U.S.C. §4506.[8] What Congress and the courts do routinely turns on the assumption that "reasonable efforts"

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[8] *See also* 5 U.S.C. §552a; 5 U.S.C. §584; 5 U.S.C. §3151; 5 U.S.C. §5564; 5 U.S.C. §8151; 5 U.S.C. §8477; 7 U.S.C. §136d; 7 U.S.C. §950aa-1; 7 U.S.C. §1596; 7 U.S.C. §1926-1; 7 U.S.C. §2001; 7 U.S.C. §3151; 7 U.S.C. §5651; 8 U.S.C. §1252a; 10 U.S.C. §2313; 10 U.S.C. §2421; 10 U.S.C. §2632; 10 U.S.C. §7730; 12 U.S.C. §375a; 12 U.S.C. §1454; 12 U.S.C. §1715e; 12 U.S.C. §1715y; 12 U.S.C. §1715z-1b; 12 U.S.C. §1716b; 12 U.S.C. §1781; 14 U.S.C. §660; 15 U.S.C. §636; 15 U.S.C. §644; 15 U.S.C. §1681e; 15 U.S.C. §1988; 15 U.S.C. §2666; 16 U.S.C. §410cc-22; 16 U.S.C. §410cc-34; 16 U.S.C. §459j-8; 16 U.S.C. §460s-7; 16 U.S.C. §460x-7; 16 U.S.C. §460aa-2; 16 U.S.C. §460gg-6; 16 U.S.C. §544g; 16 U.S.C. §698; 16 U.S.C. §1246; 16 U.S.C. §3822; 17 U.S.C. §108; 17 U.S.C. §405; 18 U.S.C. §1963; 18 U.S.C. §3523; 18 U.S.C. §3573; 18 U.S.C. §3612; 18 U.S.C. §4243; 18 U.S.C. §4246; 19 U.S.C. §2295; 19 U.S.C. §2342; 20 U.S.C. §125; 20 U.S.C. §4506; 25 U.S.C. §3002; 26 U.S.C. §274; 26 U.S.C. §4945; 26 U.S.C. §6103; 26 U.S.C. §6704; 28 U.S.C. §455; 28 U.S.C. Fed.R.Evid. 803; 28 U.S.C. Fed.R.Evid. 804; 29 U.S.C. §108; 29 U.S.C. §171; 29 U.S.C. §174; 29 U.S.C. §1105; 29 U.S.C. §1362; 30 U.S.C. §527; 30 U.S.C. §613; 30 U.S.C. §1511; 31 U.S.C. §3720A; 31 U.S.C. §6503; 33 U.S.C. §597; 33 U.S.C. §931; 33 U.S.C. §1342; 35 U.S.C. §295; 36 U.S.C. §125; 37 U.S.C. §554; 38 U.S.C. §246; 38 U.S.C. §1814; 38 U.S.C. §2021; 38 U.S.C. §3114; 38 U.S.C. §3301; 38 U.S.C. §4132; 41 U.S.C. §254; 42 U.S.C. §254b; 42 U.S.C. §254c; 42 U.S.C. §294f; 42 U.S.C. §300h-7; 42 U.S.C. §300z-5; 42 U.S.C. §300aa-10; 42 U.S.C. §300ff-51; 42 U.S.C. §421; 42 U.S.C. §423; 42 U.S.C. §602; 42 U.S.C. §652; 42 U.S.C. §671; 42 U.S.C. §672; 42 U.S.C. §1382b; 42 U.S.C. §1382c; 42 U.S.C. §1395x; 42 U.S.C. §1395mm; 42 U.S.C. §1396b; 42 U.S.C. §1396r-8; 42 U.S.C. §1396t; 42 U.S.C. §1472; 42 U.S.C. §1584; 42 U.S.C. §1766; 42 U.S.C. §1973ff-2; 42 U.S.C. §1997b; 42 U.S.C. §2000e; 42 U.S.C. §2991b-1; 42 U.S.C. §3027; 42 U.S.C. §3273; 42 U.S.C. §3812; 42 U.S.C. §4651; 42 U.S.C. §7506; 42 U.S.C. §7901; 42 U.S.C. §8781; 42 U.S.C. §9613; 42 U.S.C. §9622; 42 U.S.C. §11112; 42 U.S.C. §11361; 42 U.S.C. §11392; 42 U.S.C. §12705; 42 U.S.C. §12751; 42 U.S.C. §12771; 42 U.S.C. §13021; 42 U.S.C. §13023; 43 U.S.C. §485h; 43 U.S.C. §1845; 44 U.S.C. §2111; 45 U.S.C. §152; 45 U.S.C. §157; 45 U.S.C. §563; 45 U.S.C. §726; 49 U.S.C. App. §1348; 49 U.S.C. App. §2203; 50 U.S.C. §1431; 50 U.S.C. §1433; 50 U.S.C. §1701; 50 U.S.C. App. prec. §1; 50 U.S.C. App. §2402; and 50 U.S.C. App. §2405.

standards and obligations are capable of judicial enforcement.

2. The AACWA's "Reasonable Efforts" Clause Is Particularly Susceptible To Judicial Enforcement Under Section 1983

This Court has "'repeatedly held that the coverage of [§1983] must be broadly construed.'" *Dennis*, 111 S.Ct. at 868; *quoting Golden State*, 110 S.Ct. at 448. The text of §1983 offers no exception to the general rule that "reasonableness" standards are judicially enforceable. Indeed, this Court has readily recognized the availability of §1983 as a means of enforcing statutory reasonableness language in the two instances when it has faced the question. *Wilder*, 110 S.Ct. 2510; *Wright*, 479 U.S. 418 (1987).

Petitioners attempt to distinguish *Wilder* and *Wright* by arguing that in both cases the reasonableness language was measurable against an "objective benchmark." Pet.Br. at 29. That distinction is unavailing. Petitioners and their *amici* have advanced no explanation as to why application of the AACWA's reasonableness standard, unlike the thousands of other reasonableness standards employed by the courts, is inherently beyond the capabilities of the federal judiciary. Nor can they, for the AACWA's reasonable efforts clause can be readily measured against established benchmarks of professional social work standards that provide a clear and well-reasoned description of what constitutes "reasonable efforts" to keep families intact.[9] These written standards --

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[9] *See* Child Welfare League of America, Standards for Child Protective Services (1980); Child Welfare League of America, *Standards for Service to Strengthen and Preserve Families with Children* (1989); Child Welfare League of America, *Standards for Own Home Services* (1984); National Resource Center on Family Based Services, *Family-*
(continued...)

described fully in the AACP Brief -- provide abundant content to the reasonable efforts requirement and reflect a professional consensus on the "reasonable efforts" issues drawn from years of formal studies and practice in the field.[10] Moreover, to call conduct reasonable or unreasonable is always to do so with reference to some standard. Whether the particular benchmark is a standard of professional care, a measure of economic efficiency, the intentions of the parties or simply all of the relevant facts and circumstances, the task has never been an insuperable one for the judiciary.

The best petitioners can do by way of distinguishing this case is to seize upon the latitude left the states under the AACWA to argue that such discretion in choosing the method of compliance makes judicial enforcement of the Act's reasonable efforts provision impossible. Pet.Br. at 32-33. However, *Wilder* rejected virtually an identical argument with respect to the Boren Amendment: "While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act." 110 S.Ct. at 2523 (emphasis in original). Just because the AACWA's reasonable efforts clause leaves the states with discretion as to the nature

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[9] (...continued)
Centered Social Services: A Model For Child Welfare Agencies (1985). *See generally* National Resource Center on Family Based Services, *Annotated Bibliography on Family-Based Services* (1986)(overview of "reasonable efforts" issues); A. Maluccio & P. Sinanoglu, *Parents of Children in Foster Care: An Annotated Bibliography* (Practitioner's Press 1981)(same).

[10] These standards and the literature also fully support the district court's order in this case. The immediate assignment of a caseworker and the continued intensive intervention of the worker are essential not only in promoting family integrity but also in protecting the health and welfare of the child. *See, e.g.*, Child Welfare League of America, *Standards for Child Protective Services* (1980) at §§2.6, 2.15, 3.5.

of the efforts that will be made to preserve and reunite families does not mean that a state's discretion is unbounded.[11]

II. THE REASONABLE EFFORTS CLAUSE APPLIES TO CHILDREN WHO REMAIN IN THEIR HOMES

As to the second question presented, petitioners contend that since "Congress provide[s] no [IV-E] funding" for foster care prevention on behalf of children who have yet to be removed from their homes, Pet.Br. at 47, the plain language of the reasonable efforts clause relating to such children can be ignored, and no obligation arises to make efforts "to prevent or eliminate the need for removal of the child from his home." 42 U.S.C. §671(a)(15). Contrary to petitioner's assertion, Illinois, like every other state, is entitled to claim federal IV-E reimbursement for the costs of certain foster care prevention efforts. 42 U.S.C. §674(a)(3) -- a IV-E provision -- expressly permits reimbursement of not less than 50 percent of the "total amounts . . . necessary . . . for the proper and efficient administration of the [IV-E] plan." Federal IV-E regulations also permit reimbursement for "administrative expenditures necessary for the proper and efficient administration" of the IV-E plan, including "referral to services" and "case management and

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[11] This reasoning also explains the fallacy in the suggestion advanced by petitioner and the State *amici* that enforcement of the reasonable efforts clause will lead to 50 different federal "rights" to family preservation and reunification services. The "right" created by §671(a)(15) is a right to a state plan that makes efforts in each case which fall within the range of reason. That there may a number of service delivery models which fall within that range merely shows that Congress successfully found wording in §671(a)(15) which permitted the states to tailor their response to their particular circumstances. This does not release the states from their obligation to respond to AACWA's mandate in a reasonable manner.

supervision." 45 C.F.R. §1356.60(c)(2). HHS guidelines expressly provide that administrative expenditures may be claimed under IV-E "regardless of whether the child is actually placed in foster care," ACYF-PA-87-05, and the HHS Grant Appeals Board has so ruled. *In Re Missouri Department of Social Services*, Department of Health and Human Services, Grant Appeals Board, No. 85-209, Decision No. 844 (March 2, 1987) at 6-11 (referring specifically to foster care prevention efforts under §671(a)(15)). The petitioners are simply wrong, therefore, when they assert that IV-E funds are unavailable for children who remain in their own homes.

Moreover, even if Congress were not providing funding for foster care prevention services, the unambiguous terms of the statute make clear that the price of accepting IV-E funds is to make "reasonable efforts" to "prevent or eliminate the need for removal of the child from his home." 42 U.S.C. §671(a)(15). Under *Pennhurst*, that clear directive binds the state so long as it accepts any IV-E funds. 451 U.S. at 15.

III. THE REMAINING ISSUES RAISED BY PETITIONERS AND THEIR *AMICI* ARE NOT PROPERLY BEFORE THIS COURT, SHOULD NOT BE CONSIDERED, AND ARE WITHOUT MERIT

A. Congress Has Not Withdrawn Section 1983 As A Means For Enforcing The Reasonable Efforts Clause

Although they did not raise the issue in their petition for *certiorari*, petitioners argue in their brief that §1983 relief is foreclosed because the AACWA purportedly contains a comprehensive scheme for enforcing the reasonable efforts requirement. Pet.Br. at 40-42. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. at 20. This "comprehensive scheme" is said to consist of state court review of initial efforts

made in individual cases, 42 U.S.C §672(a)(1), and the Secretary's state plan review under 42 U.S.C. §671. Pet.Br. at 40-42.

These provisions, however, do not purport to foreclose §1983 actions. If Congress had intended to foreclose such actions, it would have done so explicitly. Indeed, when Congress enacted similar "state plan" requirements for the Child Care and Development Program, it expressly provided that "[n]othing in this paragraph shall be construed to create a private right of action" under that program. 42 U.S.C. §9858c(c)(4)(B). The absence of similar statutory usage in the AACWA raises a compelling inference that Congress did not intend to foreclose §1983 actions.

Petitioners ask this Court to infer congressional intent to foreclose §1983 actions from provisions that are silent on the issue. However, this Court will "not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24; *Golden State*, 110 S.Ct. at 449. Petitioners bear the heavy burden of demonstrating that Congress specifically intended that an alternative procedure replace §1983. *Wilder*, 110 S.Ct. at 2523; *Golden State*, 110 S.Ct. at 448. This they cannot do.

Although petitioners place much reliance on the existence of state court review under §672(a)(1), the existence of such review "is hardly a reason to bar an action under §1983, which was adopted to provide a federal remedy for the enforcement of federal rights." *Wright*, 479 U.S. at 429; *see also Wilder*, 110 S.Ct. at 2523; *Golden State*, 110 S.Ct. at 448. Moreover, nothing in the AACWA provides or suggests that §672(a)(1) reviews

are the exclusive judicial means for enforcing federal rights, or that a §1983 remedy has been foreclosed.[12]

The Solicitor General contends that state courts are more competent than federal courts to enforce the reasonable efforts requirement. This special competency is said to arise from the long experience of state courts with "domestic" issues including "custody" disputes. SG Br. at 28-29. However, the AACWA -- which regulates the circumstances under which Congress is prepared to fund state intervention into family life -- has nothing to do with domestic custody disputes between parents. Moreover, this Court has never held that federal courts are less competent to enforce federal rights, or that the mere existence of an alternative tribunal with allegedly superior "competence" is sufficient reason to infer congressional intent to foreclose access to the federal courts under §1983. Congress long ago decided in enacting §1983 that federal rights should be protected by the federal judiciary, and the Solicitor General offers no legal or policy basis to unravel that longstanding congressional determination.

Nor is the Secretary's review of state plans under §671 evidence of specific congressional intent to foreclose §1983 relief. This Court has repeatedly rejected the proposition that review by a federal agency suffices to supplant §1983 as a means of vindicating federally protected rights. *Wilder*, 110 S.Ct. at 2524; *Wright*, 479 U.S. at 428; *Ro*sado, 397 U.S. at 420-23. Petitioners offer no reason to depart from those precedents here.

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[12] Indeed, as *amici* the American Bar Association and the National Council of Juvenile and Family Court Judges demonstrate at length in their brief, the state courts cannot meaningfully complete the §672(a)(1) reviews on which petitioners rely unless the provisions of §671(a)(15) are enforced in federal court.

B. Petitioners' Effort To Define Away The Right To Reasonable Efforts Is Unavailing

In an effort to define away a right that they ultimately cannot deny, petitioners hint in a footnote (Pet Br. at 19 n.7) that the reasonable efforts clause merely creates an obligation to draft a paper "plan" and submit it for review by the Secretary, without imposing any obligation on the states to do the things specifically required by the statute and the plan itself. *See also* SG Br. at 15 n.6. That argument was not advanced in the district court or the court of appeals, and was not among the questions identified in the petition for *certiorari*. It has implications well beyond the AACWA, as numerous federal statutes, including the provisions of the Medicaid Act construed in *Wilder* and the Housing Act in *Wright*, contain similar state plan provisions.[13] A decision that effectively overrules *Wilder* and *Wright* without any consideration of the far-reaching implications of such a ruling would be unwarranted in this case.

Moreover, petitioners' position is contradicted by the plain language of the AACWA and by this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1. Since *Pennhurst*, the scope of a state's obligations under a spending clause statute has been defined by the bargain that the statute offers to states accepting federal funds. Here, the bargain for IV-E funding is that states must formulate and comply with reasonable efforts plans. The AACWA requires that a state "plan" not only be submitted to and be approved by the Secretary but also that the plan be "in effect" throughout the state. 42 U.S.C. §671(a)(3). The Secretary is required to cut off or reduce IV-E funding if he determines that the state has breached this bargain "in

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[13] *See, e.g.*, Food Stamp Act, 7 U.S.C. §§2011 *et seq.*; Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§5601 *et seq.*; Energy Conservation and Production Act, 42 U.S.C. §§6801 *et seq.*

the administration of the plan" through a "substantial failure to comply with the provisions of the plan." 42 U.S.C. §671(b). *See also* 42 U.S.C. §672(a)(1)(requiring judicial determination that reasonable efforts were made as an initial matter in individual cases). These provisions make clear by their very terms that the obligation placed on the states is not just an obligation to submit plans for HHS review, but also an obligation to actually put those plans into effect. The right that vests in children as a result of these provisions is a right to require that the states honor that obligation.

Additionally, petitioners' contention that the AACWA was intended to impose purely procedural obligations on the states is inconsistent with their own recognition that the statute creates enforceable rights. It also requires this Court to find that Congress intended to invest hundreds of millions of dollars merely to provide children with an unenforceable piece of paper. There is no conceivable justification for the purely formalistic and meaningless obligation that petitioners envision. Finally, the legislative history (reviewed fully in the AAPC Brief) is quite clear that the reasonable efforts clause was passed to substantively change the way in which states intervene in troubled families and not merely to create a written record of the states' aspirations in that regard.

C. This Court's Existing Section 1983 Jurisprudence Should Not Be Abandoned

Unlike petitioners and most of their *amici*, the Council of State Governments suggests that this Court should abandon the test it has repeatedly used to determine when a statutory right enforceable under §1983 arises. *Wilder*, 110 S.Ct. at 2517; *Dennis*, 111 S.Ct. at 871-72; *Golden State*, 110 S.Ct. at 448; *Wright*, 479 U.S. at 431-32. Council Br. at 9-16. Instead of determining whether Congress intended in 1980 to impose mandatory

obligations on the states for the benefit of plaintiffs which courts are competent to enforce, the Council would have this Court decide whether a particular class of plaintiffs had a "right" as that term was understood under the common law of contracts when §1983 was enacted in 1871. That argument, as well, is not properly before this Court and should not be considered, especially since it has not been briefed by the parties and was not presented in the petition for *certiorari*. *See IRS v. FLRA*, 494 U.S. 922 (1990); *Deshaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989).

The proposed approach, moreover, is nonsensical. No rational purpose would be served by creating a whole new cottage industry in 19th Century common law rights litigation. Indeed, just last Term, in *Dennis v. Higgins*, 111 S.Ct. at 869, this Court rejected the suggestion that the scope of §1983 should be restricted by its historical origins. Clearly, congressional intent to create rights should be determined from the vantage point of 1980, when the AACWA was passed.[14]

The suggestion that beneficiaries of federal funding statutes lack a §1983 cause of action to enforce the statutes' provisions is also flatly inconsistent with at least two dozen decisions by this Court holding that the recipients of benefits under the Social Security Act, of which the AACWA is a part, may enforce the Act's requirements.[15] Indeed, some 16 of these decisions pre-

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[14] Even under the common law of contracts, the plaintiff children still have enforceable rights. Even if the children were seen as third party beneficiaries of a contract between the state and the federal government, contract law at the time the contract was made must govern. Since the contract at issue was first made in 1980, when third party beneficiary rights were clearly established and known to Congress, the plaintiff children have enforceable rights even under this analysis.

[15] The leading cases are *Maine v. Thiboutout*, 448 U.S. 1; and *Rosado* (continued...)

ceded the passage of the AACWA in 1980, including the unanimous ruling in *Miller v. Youakim*, 440 U.S. 125, in which children directly enforced the federal foster care statute that preceded enactment of the AACWA. When Congress enacted the AACWA in 1980, it was entitled to rely on these many decisions. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Director, O.W.C.P. v. Perini North River Ass'n*, 459 U.S. 297, 319-20 (1983). The Council's Brief offers no basis for overturning them.

D. Petitioners' Policy Arguments Are Unfounded

In light of Congress' clearly expressed intent to create a mandatory provision in the reasonable efforts clause which benefits these plaintiffs, and in light of the readily justiciable nature of that provision, it is hardly surprising that petitioners and their *amici* fall back on a series of policy arguments which purport to establish what Congress "must" have meant in enacting the reasonable efforts clause. In addition to lacking any legal foundation, these arguments are without merit.

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[15] (...continued)
v. Wyman 397 U.S. at 405-06, 422-23. Other decisions that uphold the right of public assistance applicants and recipients to enforce "state plan" requirements set forth in the Act (even if sometimes rejecting their interpretation of the particular requirement at issue) include: *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Lukhard v. Reed*, 481 U.S. 368 (1987); *Atkins v. Rivera*, 477 U.S. 154 (1986); *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Herweg v. Ray*, 455 U.S. 265 (1982); *Harris v. McRae*, 448 U.S. 297 (1980); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980); *Miller v. Youakim*, 440 U.S. 125; *Quern v. Mandley*, 436 U.S. 725 (1978); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Burns v. Alcala*, 420 U.S. 575 (1975); *Shea v. Vialpando*, 461 U.S. 251 (1974); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); *Carlson v. Remilland*, 406 U.S. 598 (1972); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Townsend v. Swank*, 404 U.S. 282 (1972); *Engleman v. Amos*, 404 U.S. 23 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Petitioners argue, for example, that Congress "could not have intended" to give priority to "reasonable efforts" over the "best interest" of the child. As is demonstrated in the AAPC Brief, there is no tension between these two goals. Indeed, it is difficult to see how it could be "reasonable" to act contrary to a child's best interests. In addition, if there were a divergence between the two interests, the plain language of §671(a)(15) specifically reflects Congress' choice that the "reasonable efforts" standard governs. If petitioners disagree with that policy judgment, they can reject AACWA funding or seek their remedy in Congress. What they cannot do is seek to rewrite the AACWA's provisions in this Court.

The several variations that petitioners play on the federalism theme are equally unpersuasive. They assert that §1983 enforcement of the AACWA means that federal courts will dictate the structure of state child welfare systems; will result in "different federal rights" in different states; and will "choke the very innovation and improvement in child welfare services that was the slated purpose of the AAA." Pet.Br. at 35-36. These concerns are unwarranted.

Nothing in the AACWA dictates the structure of child welfare systems. The statute leaves the states free to structure their own systems in response to local conditions, to experiment with various models of service delivery, and to decide what range of services to offer. As this Court long ago recognized in *Rosado v. Wyman*, 397 U.S. at 422-23, it is "no part of the business" of federal courts to evaluate "the merits or wisdom of any welfare programs," but it is the duty of federal courts "no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use."

To the extent federalism issues are raised in this case, they exist precisely because the AACWA imposes

mandatory obligations on the states. Whether the courts or the Secretary enforce those obligations, the imposition of federal standards on state child welfare systems is an inescapable result of the AACWA's passage, so long as a state continues to accept IV-E funds.

This leaves petitioners' concern that a "boundless" right to "sue a State when[ever a] child . . . believes that the State's efforts have not been reasonable" will lead to a flood of litigation. Pet.Br. at 38. However, the AACWA has been the law of the land for more than a decade, and no such torrent of litigation has ensued. Only a handful of cases are reported invoking the statute, and only a few of them involve the reasonable efforts clause. Moreover, respondents do not claim a "right" to second guess the reasonable professional judgments of caseworkers. In this case, the plaintiff children alleged they had not received any efforts -- let alone reasonable ones -- to preserve their families because Illinois routinely failed to provide troubled children and their families with caseworkers. The district court specifically found that caseworkers were not being assigned to a substantial number of children and that this failure meant that no efforts were taking place to prevent foster care placement or to reunify those children with their families. The decisions of both the district court and the Seventh Circuit are extraordinarily narrow, and hinge on the substantial failure of Illinois to implement its own system for making reasonable efforts. As the Seventh Circuit held:

> [U]nder the current system as structured by DCFS, the assignment of a caseworker is absolutely essential if the DCFS is to make even the first efforts, much less reasonable ones, to maintain the child's family ties, to work toward reunification of the family if appropriate, and to ensure the child's well being. The district court's injunctive relief

> does not dictate the method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federal rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made toward the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

Pet.App. at 16a-17a (footnote omitted). This narrow holding, far from permitting plaintiffs or the federal courts to second guess caseworker decisions, merely enables federal judges to determine whether the minimum requirements of federal law have been met. Although a state can go beyond those minimum requirements, and can experiment in the means for meeting its federal obligations, it cannot fail to have structures in place -- whatever those structures may be -- that meet minimum federal requirements. Federal court review to ensure that these minimum requirements are met will not lead to a flood of litigation.

In addition, the statute does not obligate states to guarantee that each individual family will be preserved or reunited. It merely requires states to do what is "reasonable" in this regard. The federal courts have had long experience with such deferential standards in analogous constitutional contexts without any of the adverse consequences that petitioners predict. For example, institutionalized persons are entitled to receive care of a standard consistent with reasonable professional judgment, *see Youngberg v. Romeo*, 457 U.S. 307 (1982), but no avalanche of cases has resulted. Indeed, this deferential recognition that professional judgments may fall within a broad range of reason has had a generally pro-

phylactic effect since *Youngberg*, limiting litigation to those instances where professional norms have been wholly disregarded. There is no reason to believe that recognition of a §1983 action in this case will yield a result that differs markedly from the pattern of litigation that has emerged since *Youngberg*.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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